
U.S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220
412 644-5754

DATE: June 11, 1993

CASE NOS: 91-ERA-40
92-ERA-49

In the Matter of

ROBERT H. MOODY,
Complainant

v.

TENNESSEE VALLEY AUTHORITY,
Respondent

Appearances:

Charles W. Van Beke, Esq.
For the Complainant

Brent R. Marquand, Esq.
For the Respondent

Before: THOMAS M. BURKE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. §5851 and the regulations promulgated thereunder at 29 C.F.R. Part 24. These provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.C.A. §

2011, *et seq*. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear

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Regulatory Commission ("NRC") who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

This consolidated proceeding involves two complaints filed by Complainant, Robert H. Moody, against the Tennessee Valley Authority ("TVA") alleging that TVA discriminated against him in violation of Section 210 of the ERA. Complainant's initial complaint, filed on November 9, 1990, alleges "numerous and extensive acts of discrimination over a period of time, and particularly within the last thirty (30) days prior to the filing of this complaint. .. [m] ore specifically, said acts of discrimination have involved the Complainant being required to take the Level 1 Nuclear Accreditation Bonus ("NAB") exam within the last thirty days, intimidation and harassment by TVA management, the improper handling of the Complainant's service reviews, and a continuing failure to even provide proper service reviews..., improper handling of promotions including. . .temporary promotions.. .work seniority. .. in addition to other aspects and types of discrimination... a Complainant filed a second complaint on May 12, 1992 alleging that an April 13, 1992 action by the TVA suspending him for three days without pay for sleeping on the Job was discriminatory.

The November 9, 1990 complaint was investigated by the Nashville, Tennessee, regional office of the Employment Standards Administration, United States Department of Labor. The time for a decision was extended by agreement of the parties until May 8, 1991. The District Director notified the Complainant by letter dated May 7, 1991 that the allegations of discrimination raised by Complainant could not be substantiated.

Complainant, through his attorney W. P. Boone Dougherty, filed an appeal with the Office of Administrative Law Judges on May 13, 1991. A prehearing conference was scheduled for September 13, 1991 in Knoxville, Tennessee. The conference was continued at the request of Complainant for reason that his attorney, W. P. Boone Dougherty, retired from the practice of law and his recently retained attorney needed time to review the case. A hearing was scheduled for March 31, 1991; it was continued in response to a joint request of the parties to explore settlement discussions. The matter was again set for hearing on November 9, 1992 after notification by the parties

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that they were unable to reach an agreement.

Complainant's second complaint was filed on May 12, 1992. The Employment Standards Administration investigated the complaint and determined that the allegations of discrimination set forth therein could not be substantiated. Complainant timely appealed the decision to the Office of Administrative Law Judges. Upon motion of the parties it was consolidated for hearing with the November 9, 1990 complaint.

Respondent moved for summary judgment on October 13, 1992 on the grounds that the November 9, 1990 complaint was untimely filed, and the May 12, 1992 complaint alleged no genuine issues of fact and the Respondent was entitled to Judgment as a matter of law. A Decision and Order on Motion for Summary Judgment was issued on November 3, 1992 granting Respondent's motion on Complainant's allegation that he was discriminated against by being required to take the Nuclear Accreditation Bonus examination, and denying the motion on the remaining allegations of the complaints.

Hearings on the consolidated complaints were held on November 9 and 10 and December 11, 1992. Post hearing briefs were received on March 17, 1992.

FINDINGS OF FACT

Complainant has been employed at Respondent's Watts Bar Nuclear Plant power plant for nineteen years. He has worked for the last nine years as a Journeyman electrician. He contends that because he engaged in protected activity his supervisors created a hostile work environment which manifested itself in five specific discriminatory actions.

The NAB Examination

The November 9, 1990 complaint alleges that Complainant was discriminated against when he was required to retake the Nuclear Accreditation Bonus examination. Respondent moved for summary Judgment on this issue because, it contended, there was no genuine issue of fact and it was entitled to Judgment as a matter of law. In support of its motion Respondent provided an affidavit by Keith Fogleman, a human resource officer at Watts Bar responsible for personnel and labor relations, stating that all the electricians in the maintenance organization, including

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Complainant, were required to be reexamined in order to continue to receive the NAB, a monthly bonus paid to eligible electrical maintenance craftsman. Fogleman also averred that Complainant passed the examination and has been paid the bonus for every month he had met the NAB requirements. Complainant did not controvert the affidavit or the facts stated therein in his response to the motion for summary Judgment. Thus, Respondent's motion for summary Judgment on Complainant's allegation that he was discriminated against by having to take the NAB examination was granted. Nevertheless, at the commencement of the hearing, Claimant's motion for reconsideration of the order and request that he be permitted to offer testimony on the NAB issue was granted.

The gravamen of Complainant's complaint over the NAB examination is that the test was administered to him by a mechanical instructor whereas all his fellow engineers were given the test by an electrical instructor. He thus felt himself to be at a disadvantage if he needed an explanation of the test questions.

Edwin Ditto, the Electrical Maintenance Manager at Watts Bar, testified that because "the program changed" all the electricians in the Maintenance organization had to retake the NAB examination. They needed to take and pass the examination in order to continue to receive NAB bonus pay.[1]

Complainant admitted that he did not take the NAB examination with the other electricians because he was on sick leave at the time the exam was given.[2] Complainant also agreed that the test was conducted at the Training Center and administered by a person from the Center, and not from his Maintenance organization. Complainant did not know who assigned the person to conduct the test. In any event, he passed the examination and has continued to receive the NAB bonus.[3]

It is easy to find that Complainant has not shown that he was discriminated against when he took the NAB examination.

Assignment to Replacement Items Project

The Replacement Items ProJect ("RIP") was implemented to

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document every item that had been replaced at Watts Bar since its construction. The documentation would then be analyzed by an engineering group to determine the acceptability of the replacement items. The purpose of the proJect was to insure the integrity of the replacement items.[4] Respondent requested volunteers for the proJect. Complainant volunteered and was selected. Those selected were temporarily promoted to a foreman's position and paid at a foreman's rate.[5]

Complainant was assigned to the RIP from January 26 to September 30, 1989. Complainant was released from the proJect on October 2, 1989. He returned to the rate of pay as an electrician. Complainant contends that he was released from the proJect "out of normal order" in that one electrician with less seniority, Coy Hearon, was retained at RIP when Complainant was released. Complainant testified that he was one of five electricians returned to their regular Jobs at the same time. Two electricians remained on the proJect. Roger L. Brown, a supervisor in RIP, testified that Hearon was retained on the project because Hearon was the most experienced electrical person on the RIP project, and the second electrician was retained because the Electrical Maintenance Department asked that he be retained since he had recently undergone surgery which kept him from performing electrical work. Brown testified that he was under no obligation to

follow seniority rules since the work was more in the line of paper work than electrical work, and the employees were there as volunteers not because they were assigned.

Service Review For Period Claimant Worked In RIP

Complainant received a service review for the period that he worked in RIP. Complainant's "total service" was rated as fully adequate but with respect to one aspect of his work he was rated as marginal. The stated reason for the marginal review was that Complainant often had to be reminded by his' supervisor to return to his work station because he either had taken too extended a break or he had initiated discussions unrelated to his tasks with others. He was informed that his actions were hindering other employee's performance as well as his own.

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Complainant contends that he was given the marginal performance review as retribution for him expressing concerns in group meetings and in private with management about pushing the employees in the RIP program too hard causing mistakes. Complainant characterizes this expressing of concern to -A management about production at the sake of quality as engaging in protected activity.[6] Complainant identified the management people to whom he expressed his concerns as the RIP manager, Roger Brown, and, his foremen, Bill Hale and Ed Williams.[7]

Complainant's service review was prepared by Roger Brown, the RIP manager, after consultation with Hale and Williams.[8] Brown testified that he and the foremen had to admonish Complainant not to take extended breaks, and there were a couple of times when they could not locate Complainant even though he, like all employees, was suppose to notify his supervisor if he had to leave the work area.[9] Brown also testified that he doesn't recall Complainant raising with him or at meetings any safety issues or issues dealing with not having enough time to do the work safely.[10]

Service Review For Period From October 2 To December 10. 1989

Complainant returned to his permanent assignment in the Electrical Maintenance organization on September 30, 1989. His next service review was for the period October 2 to December 10, 1989. He was rated as fully adequate except for two areas where he was told that improvement was needed. Comments to the review read that Complainant "tends to wander away from his work area. On one occasion he was brought to me for not going to work as he was instructed. In fact, he was trying to resolve a problem by himself instead of going through the chain of command." A second comment states: "I feel [Complainant] tries to do a good Job but I also believe he places too heavy a burden or himself to get problems resolved which prevents him from per forming his work in a timely manner. I believe if he would keep his foreman better informed he would be more efficient and complete his work in a timely manner."

The service review was prepared by Harry Brown, the

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Electrical Maintenance general foreman, with input from Red Vaughn and Ralph Jones, Complainant's immediate foremen. The thrust of Harry Brown's displeasure with Complainant stemmed from one incident that took place about November 2, 1989. Complainant received an assignment in the form of a "work package" from his foreman, Jones. Complainant noticed that a necessary signature from the system engineer who reviewed the work instructions was missing. The engineer was no longer employed at Watts Bar. Complainant brought the problem to the attention of Jones, who sought assistance from his section supervisor. The supervisor took the stance that, although the signature should have been present, it was not crucial for the work that Complainant was doing. Jones relayed the supervisor's decision to Complainant and instructed him to proceed with the work. Jones testified that Complainant, instead of going ahead with the work, brought the matter to the attention of the union stewart, because he continued to have a problem with the missing signature and did not want to do the job until it was addressed.[11] Jones, unhappy that Complainant had not started the Job, brought the matter to Harry Brown, with the concern that Complainant was not doing "the Job assigned to him. He was not doing it in a timely manner. And therefore we were losing time as far as trying to get the Job done."[12] Brown testified that he met with Complainant and Jones and told Complainant that if he has a problem he should bring it to the attention of the foreman for resolution.[13] Hence, Harry Brown's criticism on the service review that Complainant "was trying to resolve a problem by himself instead of going through the chain of command."

Complainant saw the matter from a different prospective. He testified that he intended to proceed with the Job without the signature after instructed to do so by Jones, but that he did not understand some of the instructions, and thus could not sign the form saying he read and understood the instructions. He was seeking help from coworkers when Jones observed that he had not started the Job.

Complainant contends that the "marginal rating" aspect of the service review was in retaliation for protective activity.

Harry Brown and Jones testified that at the time the service

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review was prepared they were unaware that Complainant had reported nuclear safety concerns to any party.

Service Review For Period From December 11. 1989 to April 13. 1990

Complainant worked in the valve crew of the Mechanical Maintenance organization from December 11, 1989 to April 13, 1990. He volunteered to work with the valve crew to "get away from the atmosphere I was associated with in the electric shop."[14] His duties as a member of the valve crew involved assisting and performing corrective and maintenance on motor operated valves.

Anson Christian, Complainant's immediate foreman, and Robert Capozzi, general foreman, rated Complainant's performance for the period he worked on the valve crew as marginal on a service review report. Capozzi testified that the marginal rating was given because of problems with Complainant's reliability, in that he was absent from the Job about one-third of the time; he failed to remain at his work station, as he would "waste time" by drifting away and getting involved in the work of others; he "never really understood" the work documentation and spent "an awful lot of time having someone review and rereview and explain the documentation";[15] and he was found to be generally not as productive as his peers.[16]

Complainant disagreed that there were problems with his work performance. In fact, he testified that he had requested his foremen to notify him if they had any concerns with his work, but no one mentioned any problems until they met with him to discuss the service review rating. Christian and Capozzi both testified that they had talked to Complainant about unacceptable performance throughout his work with the valve crew. Capozzi stated that he had even been forced to give Complainant a verbal reprimand.

Christian and Capozzi testified that they did not rate Complainant's performance as marginal because he had engaged in protective activity. In fact, they were unaware that he had reported any safety violations or otherwise engaged in protected activity.

In any event, Complainant did not suffer any harm or

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recourse as a result of a review of his performance with the valve crew as the service review prepared by Christian and Capozzi was never issued. Capozzi testified that the aforesaid service review was never "officially" issued or made part of Complainant's personnel file because, if issued, it would have resulted in Complainant losing his yearly NAB, and Capozzi did not want to see that happen.[17]

Three Day Suspension

On April 3, 1992, Ditto observed Complainant away from his work area, in another employee's cubicle, leaning back in a chair with his feet on a desk and his eyes closed, apparently sleep. He had been in this position for about 15 to 20 minutes. Ditto testified that sleeping on the job is considered to be a serious offense at a nuclear plant. He asked three other employees to observe Complainant's position. When Complainant woke up, Ditto asked him if he had been sleeping. Complainant responded: "I may have been."

Ditto asked if he was sick. Complainant responded: "I may be." Ditto instructed Complainant to inform his foreman about his whereabouts and then report to medical service.[18]

Complainant does not dispute Ditto's testimony. Rather, he explained that he went to a quiet place to relax as he was anxious and upset over a meeting he had with Ditto earlier in the day. He took the prescription medication, Xanax, apparently a sedative, to help him relax. The next thing he remembered was seeing people standing over him.[19]

As a result of the incident, Complainant was suspended without pay for three days. In a memorandum dated April 13, 1992, Complainant was informed by Ditto why the disciplinary action was taken:

> [Disciplinary action) is being taken as a result of your having been found apparently asleep on the Job on April 3, 1992. This behavior is in violation of TVA policy as described in Nuclear Power Business Practice BP-101, `Employee Conduct and Disciplinary Guidelines.'
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> ...
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> Sleeping on the Job is a serious offense which can result in

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> termination. Because of mitigating circumstances this is not necessary in the present situation. Please note that according to the employee conduct and disciplinary guidelines, any future incidents of this nature will result in termination.[20]

Ditto testified that he considered the fact that Complainant was under the influence of a prescription medication which caused drowsiness a factor which mitigated against a penalty more severe than the three day suspension.[21] Ditto also testified that he could have, but did not, discipline Complainant for taking the Xanax medication on the Job without first informing his supervisor, as required by the plant's fitness for duty program.[22]

Complainant contends that the three day suspension was not imposed because he was found sleeping on the Job, as stated in the April 13, 1992 letter, but because he had "reported nuclear safety concerns" and filed the November 9, 1990 whistle blower complaint with the Department of Labor. Ditto countered that the suspension was not leveled because Complainant had engaged in protected activity, but rather the action was taken in accord with Employee Conduct and Disciplinary Guidelines, BP-101. Section 3.6.7 of the Guidelines provides as follows:

> Sleeping during working hours is a violation of TVA work rules and is strictly prohibited. Employees found sleeping on the Job while performing safety-related work such as firewatch, operation of the equipment, or any activity which could affect the safety of the employee, other employees, or the safe operation of the plant shall be terminated. Additionally, those employees who are diagnosed

sleeping on the Job and have taken efforts to conceal or pre-plan the activity shall be terminated.
In situations where an employee has fallen asleep when not performing work which may directly affect safety or has nor tried to conceal it, the employee shall be suspended. However, repeated instances of sleeping on the Job shall result in termination.[23]

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Complainant argues that this matter is not governed by BP- 101, but rather by a separate set of disciplinary guidelines issued on February 3, 1992.

Complaint Timely Filed

Section 210(b) (1) of the ERA sets forth time limits within which a complaint must be filed. It provides:

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of Subsection (a) may, within thirty days after such violation occurs, file a complaint with the Secretary of Labor alleging such discharge or discrimination. 42 U.S.C. 5851(b) (1)

Also, Section 24.3(b) of the DOL regulations provides that "[a]ny complaint shall be filed within 30 days after the occurrence of the alleged violation." 29 C.F.R. Section 24.3.

Respondent's motion for summary judgment contends that the November 9, 1990 complaint was untimely filed. Respondent's motion was denied in a Decision and Order on Motion for Summary Judgment issued on November 3, 1992, for reason that Complainant alleged a continuing violation of harassment and intimidation, some of which took place within thirty days of the filing of his complaint. These allegations, if proven, would toll the thirty day statutory filing period through an equitable exception to the statutory limitations period for continuing violations.

It is well settled that a complaint under the Act must be filed within thirty days of the occurrence of the alleged violation and that failure to timely file a complaint is grounds for dismissal. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988); *Cox v. Radiology Consulting Associates*, 86-ERA-17 (Sec'y, Nov. 6, 1986). However, the courts have generally recognized an equitable exception to statutory limitations periods for continuing violations. The court in *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989) explains that a series of separate violations may be treated as a continuing violation because requiring an employee to sue separately on each one would be unreasonable, and an employee may have no reason to believe he

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was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory behavior.

To establish a continuing violation, the Complainant must show that one or more of the series of related acts fall within the limitations period, or that the discriminatory system was maintained' both before and during the limitations period. *Bruno v. Western Electric Co.*, 829 F.2d 957 at 961 (10th Cir. 1987). Here, although Complainant alleged that intimidatation and harassment occurred "right up to the filing of his November 9, 1990 complaint,"[24] he offered evidence on but one incident occurring within the limitation period that he contends was discriminatory, the NAB examination. However, for reasons previously discussed herein, the NAB examination did not constitute an adverse action. Complainant passed the examination and continues to receive the resulting NAB bonus pay.

Complainant has not identified any act of discrimination which occurred within thirty days of the filing of the November 9, 1990 Complaint. Thus, his November 9, 1990 complaint must be dismissed as untimely filed under Section 210 of the Act and 29 C.F.R. Section 24.3.

Merits of Claim

Assuming, *arguendo*, that the November 9, 1990 complaint was timely filed, the Complainant has not shown that the Respondent engaged in disparate treatment toward him.

The requirements for establishing a *prima facie* case under Section 210 of the Act were set out by the Sixth Circuit Court of Appeals in *DeFord v. Secretary of Labor et al*, 700 F.2d 281 (6th Cir. 1983). They are: (1) the party charged with discrimination is an employer subject to the Act; (2) the employee engaged in protected conduct; (3) the employer took some adverse action against the employee; and (4) the protected conduct was the likely reason for the adverse action.

Initially, Respondent does not contest that it is subject to the Act by virtue of its ownership and operation of the Watts Barr Nuclear Plant. The three other criteria for establishing a *prima facie* case are in dispute.

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Protected Activity

Section 5851 of the Act prohibits discrimination against employees who:

> 1. commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any

requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
2. testified or is about to testify in any such proceeding, or;
3. assisted or participated or is about to assist or participate in any manner in such a proceeding or in any such manner in such a proceeding or in in any action to carry out the purposes of this Chapter or the Atomic Energy Act of 1954, as amended. 42 U.S.C. § 5851(a).

Complainant testified that he notified the Nuclear Regulatory Commission about transformers with inappropriate fits of bolts and bolt holes to the extent that the bolts might not take the necessary torque. This contact constitutes protected activity. However, the contact did not occur until after Complainant filed his November 9, 1990 complaint. Thus, it obviously cannot be considered as a basis for a retaliatory motive under the November 9, 1990 complaint.[25]

In light of the remedial purposes of the Act, and the wording of § 5851, which provides that the proceeding includes "any action to carry out the purposes of" nuclear safety regulations, the courts have extended the coverage of the Act to internal safety complaints by employees to their management. *Mackowiak v. University Nuclear Systems Inc.*, 735 P.2d 1159 (9th Cir. 1984); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985); *Nichols v. Bechtel Construction. Inc.*, 87-ERA- 44 (Sec'y, Oct. 26, 1991).

Complainant testified that during the period he was working

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on the Replacement Item Project he "mentioned to management several times in meetings -- in group meetings and... in private. . .about pushing people too hard and them making too many mistakes and overlooking areas that they could catch...[26] He discussed these matters "mostly" with Roger Brown, proJect supervisor, as well as William Male and Ed Williams, his foremen.[27]

Complainant's "mentioning" of these safety matters in meetings with his supervisors, although informal and apparently oral, constitutes protected activity, particularly in light of the Secretary's construal of § 5851 in *Nichols, supra*. The Secretary held that an employee's "questioning" of a foreman "about the correct safety procedure for surveying and tagging tools" is protected activity.

Accordingly, it is determined that Complainant has established that he engaged in protected activity.

Adverse Action

To establish a *prima facie* case, Complainant must show that he was subject to an adverse action by Respondent. *Howard v. TVA*, 90-ERA-24 (Sec'y, July 31, 1991); *Doyle v. Bartlett Nuclear Services*, 89-ERA-18 (Sec'y, May 22, 1990) As discussed previously, the November 9, 1990 Complaint alleged five discriminatory actions taken by Respondent against Complainant, that is, the NAB examination, release from the Replacement Items Project, and the three performance reviews.

There is no evidence of any adverse affect on Complainant from having to retake the NAB examination. Ne does not dispute that all the engineers in the Maintenance organization were required to retake the examination to preserve their eligibility to receive the NAB bonus. Complainant passed the examination and continues to receive the NAB bonus.

Complainant was not adversely affected by the three service reviews. The service review prepared for the period December 11, 1989 to April 13, 1990, was never issued and never made a part of Complainant's personnel file. The other two service reviews were withdrawn by Respondent before Complainant filed his November 9, 1990 Complaint with DOL. Complainant challenged the marginal

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rating he received in those two service reviews in a grievance proceeding under the collective bargaining agreement. The grievance was resolved on August 9, 1990 through an agreement by Respondent to delete both service reviews and to consider Complainant's performance for those periods as fully adequate.[28]

Complainant did suffer adverse consequences when he was returned to his regular Job from temporary duty on the RIP project. The temporary promotion and the resulting foreman's rate of pay ceased.

Causal Relationship

Complainant has shown that he engaged in protected activity, and that he suffered an adverse action when he was subsequently returned to his regular Job from the higher paying temporary position on the RIP project. Complainant must also present evidence sufficient to raise the inference that the protected activity was the reason that the Respondent ended his temporary position. *Dartey v. Zach Company of Chicago*, Case No. 82-ERA-2, (Sec'y, April 25, ,1993). *Stack v. Pearson Trucking Co.*, 86-STA- 22, (Sec'y, Feb. 26, 1987).

Complainant was returned to his regular Job from his temporary position with the RIP program as the program was being scaled back. He was one of five engineers released to their permanent positions at that time. Two engineers, Coy Hearon and Jim Hoover, were retained for a longer period. Hoover was retained at the request of the Maintenance organization, his permanent group, because he had recently undergone surgery, and was

unable to perform full electrical duties. Complainant's argument that he was the victim of discrimination centers on the retention of Hearon. Specifically, Complainant contends he should have been retained over Hearon because he has more plant seniority.

Complainant has not offered sufficient evidence to allow the inference to be drawn that he was released from the temporary position before Hearon for discriminatory reasons. He offered the testimony of Eddie DeBusk, a Job stewart for the Brotherhood of Electrical Workers, and Hearon. DeBusk testified that the collective bargaining agreement provides that, although seniority should be given due regard, it is only one factor to be

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considered along with merit and efficiency, in personnel moves such as transfer and retention.[29] Hearon testified that he does not think he has less seniority than Complainant, but he is sure he had more experience on the RIP project than Complainant at the time Complainant was released. Hearon also testified that prior to working on the RIP program, he had experience working on a similar project at the TVA operated Sequoyah Nuclear Plant.[30] This testimony, considered along with the testimony of George Brown, a supervisor in the RIP proJect, that Hearon was retained because he was the most experienced electrical person in the RIP program and had been with him since the program's conception at Sequoyah,[31] is determined to be insufficient to infer a discriminatory motive to Respondent's action of returning Complainant to his regular position during the scale down of the RIP program.

Accordingly, it is determined that Complainant has not established a *prima facie* case under the allegations of his November 9, 1990 complaint that Respondent engaged in disparate treatment toward him.

Merits of May 12. 1992 Complaint

Complainant contends that the disciplinary action of three days suspension set forth in the April 13, 1992 memorandum was taken by Respondent because Complainant engaged in protected activity. The memorandum notified Complainant that he was suspended for three days because he was "found apparently asleep on the job on April 3, 1992."

Complainant has established that he engaged in protected activity and subsequently suffered an adverse action. As previously discussed, Complainant engaged in protected activity when' he mentioned safety matters in meetings with his supervisors. Also, his notice to the Nuclear Regulatory Commission about transformers with inappropriate fits of bolts to bolt holes, constitutes protected activity because the contact was made sometime prior to November 16, 1990,[32] and thus before the three day suspension was imposed.

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Complainant has not produced sufficient evidence to allow an inference to be drawn that the three day suspension was imposed as retaliation for the protected activity. It is undisputed that the suspension was imposed after the Complainant's supervisor found him either asleep, or drowsy as the result of taking prescription medication which acts as a sedative. The April 13, 1992 memorandum advising Complainant of the disciplinary action, informed him that his conduct, sleeping on the Job, violated $3.6.7 of Employee Conduct and Disciplinary Guidelines, BP-101, and that such conduct could result in termination, but because of mitigating circumstances, would invoke only a three day suspension. Actually, Ditto may have lacked the discretion under $3.6.7 to not impose a suspension after observing Complainant. In any event, there is nothing in the record that would bring into question Ditto's actions or the credibility of the April 13, 1992 memorandum.

Assuming that Complainant met his burden of producing sufficient evidence to allow an inference to be drawn that the suspension resulted from Complainant's engaging in protected activity, and thus presented a *prima facie* case, Respondent clearly would have met its burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by a legitimate nondiscriminatory reason. *Dartey v. Zack, supra*.

Complainant questions the Respondent's stated reasoning for the suspension for two reasons: Complainant was not sleeping when observed by Ditto but was under the medication, Xanax; and the Employee Conduct and Disciplinary Guidelines, BP-101, applied by Respondent here, do not govern this matter.[33]

The decision to suspend Complainant was made by Ditto. He testified that before making his decision, he discussed the matter with Complainant while accompanied by the union stewart, Ed DeBusk; and sought input from Dr. Zachary of Watts Bar medical services; and Mark Vestano, a TVA Human Resources officer.

Ditto met with Complainant the same afternoon he observed him sleeping. Complainant told Ditto that he took the Xanax because he found their morning meeting to be stressful; that he subsequently went to Dan Anderson's cubicle to relax, but he was unable to say whether or not he fell asleep. Ditto next talked

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to Vestano who advised him that the typical suspension was two weeks but that it could be mitigated if Complainant was having medical problems. Vestano suggested they consult with Dr. Zachery. They were informed by Dr. Zachery that Xanax can cause sleepiness, and that Complainant should have known better than to take it while working. Dr. Zachery also told Ditto that Complainant had been told not to take the drug without first telling his supervisor.[34] Ditto testified that based on this information he imposed the

three day suspension. Ditto's testimony is found to be creditable and is uncontradicted. It supports a conclusion that the three day suspension issued by the April 13, 1992 memorandum was motivated by legitimate, nondiscriminatory reasons.

In summary, it is determined that the Complainant has not met his burden of showing that Respondent has engaged in adverse action against him in retaliation for his taking part in protected activity.

CONCLUSIONS OF LAW

1. The Energy Reorganization Act of 1974 governs the parties and the subject matter.

2. The November 9, 1990 complaint in this matter was not timely filed in that it was not filed within thirty days after the occurrence of the alleged violation as required by 29 CFR § 24.3

3. The thirty-day statute of limitations at 29 CFR $24.3 was not tolled by equitable considerations in that Complainant has not shown a series of continuing actions, one of which occurred within thirty days of the filing of the complaint.

4. Complainant has not established a *prima facie* case under the Energy Reorganization Act in that Complainant has not met his burden of showing that he was discriminated against because he engaged in protected activity.

5. Assuming, *arguendo*, that Complainant has established a prima facie case, Respondent has met its burden of rebutting the presumption of disparate treatment by showing that its actions were motivated by legitimate, nondiscriminatory reasons.

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ORDER

AND NOW, this 11th day of June, 1993, IT IS HEREBY RECOMMENDED that the complaints of November 9, 1990 and May 12, 1992 of Robert H. Moody be dismissed.

THOMAS M. BURKE
Administrative Law Judge

[ENDNOTES]

[1] N.T. p. 661.

[2] N.T. p. 336.

[3] N.T. p. 661.

[4] N.T. pp. 199, 463.

[5] N.T. p. 30.

[6] N.T. p. 56.

[7] N.T. p. 58.

[8] N.T. pp. 459, 460.

[9] N.T. pp. 460, 466.

[10] N.T. pp. 472, 474.

[11] N.T. pp. 533-535.

[12] N.T. p. 561.

[13] N.T. p. 517.

[14] N.T. p. 92.

[15] N.T. p. 496.

[16] N.T. pp. 494-496.

[17] N.T. p. 502.

[18] N.T. p. 562.

[19] N.T. p. 173.

[20] Administrative Law Judge Exhibit No. 2.

[21] N.T. p. 651; ALJ Ex. No. 2.

[22] N.T. p. 654.

[23] Respondent Exhibit No. 13.

[24] See Complainant's response to Motion For Summary Judgment

[25] N.T. pp. 163, 164.

[26] N.T. p. 56.

[27] N.T. p. 58.

[28] Respondent's Exhibit No. 8 and stipulation of parties at N.T. p. 234.

[29] N.T. p. 236; Respondent'e Exhibit No. 10.

[30] N.T. p. 211-213.

[31] N.T. p. 510.

[32] See Stipulation of Counsel submitting the testimony of James Cruise stating that the issue of a TVA employee identifying a concern with the transformer splice plates was referenced by the Nuclear Regulatory Commission in a November 16, 1990 meeting.

[33] Complainant's response to Respondent's Motion for Summary Judgment.

[34] N.T. pp. 562-570; Respondent's Exhibit No. 15.